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October 29, 2008

VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Notice of *Ex Parte* Meeting: CC Docket No. 99-68; WC Docket No. 01-92

Dear Ms. Dortch:

Yesterday, Bret Mingo, Chris Van de Verg, and James Falvey of Core Communications, Inc. ("Core"), along with the undersigned counsel, participated in separate *ex parte* meetings with: (i) Commissioner Jonathan Adelstein and Scott Bergmann and (ii) Commissioner Robert McDowell and Nicholas Alexander. The attached materials served as the basis for the discussion.

During the meetings, Core noted that telecommunications to ISPs are no different than any other telecommunications, and there is no basis in the statute for creating subcategories of telecommunications. Section 251(b)(5) of the act applies equally to all telecommunications. Rates set by state commissions under section 252(d)(2) apply equally to all telecommunications. Neither of these statutory provisions permit discrimination against any type of traffic that constitutes telecommunications. Any effort by the Commission to exclude temporarily or permanently telecommunications to ISP end users from section 251(b)(5) or to apply a rate different than the section 252(d)(2) rates set by the state commissions will not survive judicial review.

Sincerely,

Michael B. Hazzard
Counsel for Core Communications, Inc.

Attachments: (4)

cc: **Via electronic mail**
Commissioner Jonathan Adelstein
Nicholas Alexander
Commissioner Robert McDowell
Scott Bergmann

TAB A

Core Communications, Inc.
CC Docket No. 99-68 and WC Docket No. 01-92
October 28, 2008

I. Any Attempt to Unify Rates Must Begin with a Solid Foundation in the 1996 Act.

- The ISP Remand Order and its interim rules provide no such foundation. Indeed, the ISP Remand Order was not affirmed, and the *Core Mandamus Order* strongly suggests that the court believes in retrospect that vacatur was the appropriate remedy.

- Indeed, the court has expressed extreme skepticism regarding the continuing validity of the interim rules:

  - "It is now seven years since the FCC put in place the interim rules that it said would last only three. It is now six years since we held, for the second time, that the FCC's legal justification for the rules was invalid and remanded for the agency to provide a valid justification. During all this time, the FCC has proceeded-as it did in *PEPCO* and *Radio-Television*-to enforce rules for which it has articulated no lawful basis." *Core Mandamus Order*, 531 F.3d 849, 857.

- The interim rules cannot be relabeled after the fact as an implementation of section 251(b)(5). The interim rules openly discriminate between and among carriers and traffic types, in contravention of section 251(b)(5), which applies on its face to all "telecommunications."

  - The $.0007/MOU rate cap in particular has no legal or evidentiary basis. It is simply an arbitrary figure plucked from agreements between Level3 and incumbents in 2001. It does represent any costing methodology. It represents the commercial interests of a limited set of firms.

  - The $.0007/MOU rate cap is part and parcel of the interim rules, and makes no sense outside of that context. It is not a standalone rate, but rather part of the interim rules' complex interplay. For example, the "three to one ratio" rule is designed to divide "ISP-bound" from "section 251(b)(5)" traffic. Only the former is subject to the $0.0007 rate cap; the latter is fully compensable at state reciprocal compensation rates.

- The court's mandate is to justify all of the interim rules, none of which appear to have any rational basis outside of the FCC's original premise, i.e., a transition to bill-and-keep.

Viewed through the lens of section 251(b)(5), these rules have serious deficiencies that will prove impossible to justify:

- The 3:1 Ratio openly discriminates between traffic types, even though FCC recognized no cost differences

- The ability of incumbents to "elect" application of the interim rules on a state-by-state basis is an unlawful delegation of the agency's rate setting function, and blatantly discriminates between carriers and against competitive carriers.

- Moving now from TELRIC to a new and unheralded cost methodology without proper notice creates unnecessary risk on judicial review.

  - The FCC should put any new cost methodology proposal out for notice and comment.

  - TELRIC has been approved by the Supreme Court as a valid exercise of the FCC's authority under section 252(d)(2).

  - A new methodology raises numerous legal, technical, and economic issues that simply have not been aired.

  - Given the FCC is contemplating a ten year transition, why not use a portion of that time to properly notice the new methodology out for comment?

- The Current Proposal Cannot be Sustained Under as Assertion of Interim or Transitional Authority

  - The $0.0007 rate cap is itself the product of the FCC's previous assertion of interim authority.

  - The FCC cannot base one interim regime on the byproduct of a previous interim regime. Such leveraging would only provoke further reaction from the court.

  - No matter what methodology the FCC ultimately promulgates, there is no rational basis for the FCC to assume that resulting rates will ever dip below $0.0007/MOU, much less at the end of a ten year transition period. The FCC simply cannot predict

the effect of exogenous events, including inflation, for example, on the outcome of any model.

- To the extent the FCC's new methodology actually constrains state commissions to promulgate a rate below $0.0007, or even a single nationwide rate at any level, such a methodology amounts to impermissible rate setting.

- Courts have specifically found that the FCC's role "is to resolve general methodological issues, and it is the state commission's role to exercise its discretion in establishing rates." *Iowa Utilities Board*, 219 F.3d 744, 756 (2000).

- Classifying Interconnected VOIP Traffic as Information Service or Otherwise Outside of Section 251(b)(5) Retreads the Failed Path of the ISP Remand Order

  - In *WorldCom,* the court found that ISP-bound traffic could not be excluded from section 251(b)(5) by virtue of section 251(g) preservation of pre-Act compensation rules, since there was no pre-Act rule regarding compensation for ISP-bound traffic.

  - Similarly, the FCC cannot use section 251(g) to exclude interconnected VOIP from section 251(b)(5) because there was no pre-Act rule regarding compensation for interconnected VOIP.

  - In any event, whether the FCC classifies interconnected VOIP as a "telecommunications service" or an "information service", the fact remains that it has already been classified as "telecommunications."

  - Under section 251(b)(5), all "telecommunications" are equally compensable.

- Devising New Interconnection Rules Now is a Pointless and Wasteful Exercise

  - Similar to the new cost methodology, any new proposal to change existing interconnection rules should put out for notice and comment.

  - The current rules have been fully implemented in numerous state ICA arbitration proceedings.

  - There is no evidence that the current rules, or their implementation in ICAs, unduly burdens any segment of the industry.

- Further, there is no evidence that the current rules, or their implementation in ICAs, have any nexus to intercarrier compensation. Interconnection rules govern the physical links between separate networks. Intercarrier compensation rules govern compensation for the transport and termination of traffic within networks. No party has even attempted to explain how proposed changes in intercarrier compensation require any modification to interconnection rules.

- Additionally, section 251(c)(2) requires incumbent LECs to provide interconnection pursuant to specific statutory standards, including interconnection "at any technically feasible point." Years of arbitration and implementation have yielded a very clear and expansive universe of "technically feasible" points of interconnection. The FCC cannot rationally remake the interconnection rules if to do so would render these same points of interconnection not "technically feasible" when the evidence clearly demonstrates that they are.

II. The FCC Can Achieve Rate Unification Under Section 251(b)(5), But Only If Treats All "Telecommunications" the Same

- The FCC can clearly replace the existing "exchange access" regime, currently preserved under section 251(g)'s grandfather clause, with a unified rate regime under section 251(b)(5).

- In superseding section 251(g) the FCC can roll all existing interstate access, intrastate access, "local" and ISP-bound traffic into section 251(b)(5)'s cost-based reciprocal compensation regime.

- Indeed, the FCC has previously found that "the Commission could decide to subject all traffic to the reciprocal compensation regime in section 251(b)(5) through new regulation." ¶16 and note 55.

- In crafting a transition from section 251(g)'s grandfather clause to section 251(b)(5), the Commission could implement a three year period to ratchet down rates.

- However, if it does choose to implement a transition, the FCC must immediately put ISP-bound traffic in the same rate basket as other section 251(b)(5) traffic, to avoid continuing unjustified rate discrimination.

- Assuming the Commission is determined to implement a new cost methodology, it should rely on the current state commission TELRIC rates during any transition period.

- The Commission should issue an NPRM to air the new cost methodology.

- The Commission should acknowledge that interconnected VOIP, like ISP-bound traffic and ordinary "local" traffic, is fully compensable reciprocal compensation traffic under section 251(b)(5).

- The Commission should address possible USF reform is a separate proceeding. There is as yet no hard evidence that a move from the exchange access regime to a reciprocal compensation regime would impact valid universal service policies and objectives.

TAB B

On Judicial Review, the Court is Unlikely to Accept Any Further Attempt by the FCC to Exclude ISP-Bound Traffic from Reciprocal Compensation Under Section 251(b)(5) of the Act, or to Otherwise Maintain the Interim Rules.

- Although courts of course do generally grant agencies wide discretion in addressing the issues that come before them, this issue has a long and increasingly familiar history with the judges on the D.C. Circuit Court of Appeals.

- Ever since the FCC's *ISP Declaratory Ruling,* (1999), the D.C. Circuit has become increasingly skeptical of the agency's attempts to exclude ISP-bound traffic from the ambit of section 251(b)(5).

- The court reviewed the *ISP Declaratory Ruling* in *Bell Atlantic.* The Court (J. Williams) rejected the FCC's attempt to exclude ISP-bound calls from section 251(b)(5) on the basis that the calls terminated, not in the caller's local exchange, but rather at various distant websites. Specifically, the Court:

  - Vacated and remanded, finding that "[h]owever sound the [FCC's] end-to-end analysis may be for jurisdictional purposes, the Commission has not explained why viewing these linked telecommunications as continuous works for purposes of reciprocal compensation."
  - Rejected the FCC's reliance on its jurisdictional "end to end analysis" as relevant for intercarrier compensation purposes.

  - Rejected the FCC's attempt to equate an ISP-bound call to "an 800 call to a long-distance carrier" or to a "voice mail service."

  - Found that ISPs appear to be the "called party" under the FCC's definition of "termination."

  - Found that "[t]he Commission has not satisfactorily explained why an ISP is not, for purposes of reciprocal compensation, "simply a communications-intensive business end user selling a product to other consumer and business end-users."

  - Noted that the FCC previously stated that "it is not clear that [information service providers] use the public switched network in a manner analogous to IXCs [inter-exchange carriers]."

  - Found, as a separate ground for remand, that "[i]f the Commission meant to place ISP-traffic within a third category, not "telephone exchange service" and not "exchange access," that would conflict with its concession on appeal that "exchange access" and "telephone exchange service" occupy the field."

- Notably, the FCC has never responded to any of the Court's findings and directions in *Bell Atlantic.* In order to move forward with an order excluding ISP-bound traffic from section 251(b)(5) the FCC must surely answer them now.
  - Any attempt to rely on an "end to end" or "one call" analysis will once again fail to answer the court's concerns about treating locally dialed telephone calls to ISPs differently from other locally dialed calls.
  - Any attempt to label ISP-bound traffic "exchange access" will raise the same conundrums of telephone exchange service versus exchange access and application of the ESP exemption.
- The court (again, J. Williams) reviewed the FCC's 2001 *ISP Remand Order* in *WorldCom* (2002). Here, the court rejected the FCC's new theory that ISP-bound calls were excluded from section 251(b)(5) because they constitute "information access" under section 251(g). The court found:
  - "On its face, § 251(g) appears to provide simply for the "continued enforcement" of certain pre-Act regulatory "interconnection restrictions and obligations," including the ones contained in the consent decree that broke up the Bell System, until they are explicitly superceded by Commission action implementing the Act."
  - "[T]he Commission does not even point to any pre-Act, federally created obligation for LECs to interconnect to each other for ISP-bound calls."
  - And even if this hurdle were overcome, there would remain the fact that § 251(g) speaks only of services provided "to interexchange carriers and information *434 **181 service providers"; LECs' services to other LECs, even if en route to an ISP, are not "to" either an IXC or to an ISP."
- The court unequivocally found that ISP-bound traffic is not governed by section 251(g). This means not only that it is not "information access" but also that it does not fall within 251(g)'s other categories: "exchange access" or "exchange services for such access."
- The Court also found:
  - [W]e do not decide petitioners' claims that the interim pricing limits imposed by the Commission are inadequately reasoned. Because we can't yet know the legal basis for the Commission's ultimate rules, or even what those rules may prove to be, we have no meaningful context in which to assess these explicitly transitional measures."
  - This means the FCC must now harmonize each of the *ISP Remand Order's* "explicitly" interim pricing rules (1) pursuant to whatever statutory

justification it chooses to adopt; and (2) as a transition to whatever "ultimate rules" it chooses to adopt.

- The Court concluded:
  - "Finally, we do not vacate the order. Many of the petitioners themselves favor bill-and-keep, and there is plainly a non-trivial likelihood that the Commission has authority to elect such a system (perhaps under § § 251(b)(5) and 252(d)(B)(i))."
  - The court was clearly preoccupied by the perception that WorldCom and perhaps other petitioners supported bill-and-keep as a long term goal, and would be willing to "waive mutual recovery" pursuant to an FCC plan under section 252(d)(B)(i).
  - At the hearing, the court asked counsel for WorldCom whether petitioners challenged the end result of the order (bill and keep) or merely the legal theory underlying that regime.
  - Notably, the court also assumed that the FCC's interim rules were founded on a long term goal of bill-and-keep. Of course, the Commission has since abandoned that goal.
- In the hearing on Core's mandamus petition (*In re Core Communications, Inc.*) in May, the court (J. Tatel) asked the simple question:
  - "Why does it take seven years to answer this very simple question, which is what is the legal basis for treating ISP calls differently? I mean, it's not like most of our mandamus cases where the charge to the agency is extremely complex. This is just a straightforward question. What's the legal authority for treating ISP differently?"
  - The court's focus has irrevocably shifted. The issue of ISP-bound traffic is no longer a tabula rasa for the agency. The court's baseline assumption now is that this traffic is fully compensable under section 251(b)(5)—unless the Commission can somehow show otherwise.
  - J. Tatel pressed FCC counsel repeatedly, asking whether the FCC would like to have the court's view on ISP-bound traffic prior to any ruling on global intercarrier compensation issues. FCC counsel repeatedly said "no," indicating his fear that the court simply does not agree with the FCC's longstanding efforts to exclude ISP-bound traffic from section 251(b)(5).
- In *In re Core Communications,* the court (J. Garland) restated the issue in the starkest terms possible. The Court found:

- "The Federal Communications Commission (FCC) has twice failed to articulate a valid legal justification for its rules governing intercarrier compensation for telecommunications traffic bound for Internet service providers (ISPs). In March 2000, this court vacated and remanded the Commission's first attempt at a justification. In May 2002, we rejected its second attempt, in that case remanding without vacating because we thought there was a "non-trivial likelihood" the Commission would be able to state a valid legal basis for its rule... No such justification has been forthcoming."

- The court clearly outlined its expectation that: "If ISP-bound traffic were governed by § 251(b)(5), reciprocal compensation arrangements would be required for the ILEC-to-CLEC hand-off just described, and ILECs would be required to compensate CLECs-like Core-for completing their customers' calls to ISPs."

- The court underlined that it had no expectation that there is any legal basis for discrimination against ISP-bound traffic: "Having repeatedly, and mistakenly, put our faith in the Commission, we will not do so again. If the FCC cannot, within six months, explain its legal authority for the interim rules, we can only presume that this is because there is in fact no such authority. Under those conditions, vacatur is indicated. See, Allied-Signal, 988 F.2d at 150-51. Accordingly, the rules will be vacated on November 6, 2008, unless the court is notified that the Commission has complied with our direction before that date."

- The court does not actually expect that the FCC will be able to justify the interim rules; however, it is giving due deference to the Chairman's representations made at the hearing. In addition, the court needs for the agency to issue a decision to enable judicial review and final conclusion of the issue.

- The court gave specific instructions: "For the foregoing reasons, we grant the writ of mandamus and direct the FCC to *862 respond to our 2002 WorldCom remand by November 5, 2008. That response must be in the form of a final, appealable order that explains the legal authority for the Commission's interim intercarrier compensation rules that exclude ISP-bound traffic from the reciprocal compensation requirement of § 251(b)(5). No extensions of this deadline will be granted. The rules are hereby vacated on November 6, 2008, unless the court is notified that the Commission has complied with our direction before that date. This panel of the court will retain jurisdiction over the case to ensure compliance with our decision. See, MCI, 627 F.2d at 325."

- The court is expecting an order that explains why ISP-bound traffic in NOT in 251(b)(5). The Commission has been telling the court for the last nine years that ISP-bound traffic is excluded from 251(b)(5). The court does not expect—and it will reject—any order that classifies ISP-bound traffic as 251(b)(5), and yet

continues to discriminate against ISP-bound traffic using the same rate caps and other rules that applied under the Commission previous 251(g) theory. Put another way, any order that uses 251(b)(5) as the basis to facilitate further rate discrimination fails to comply with the court's mandate to "**explain[] the legal authority** for the Commission's interim intercarrier compensation rules that **exclude ISP-bound traffic from** the reciprocal compensation requirement of **§ 251(b)(5).**"

- If the Commission issues such an order, the court will find that it fails to comply with the mandate, and the rules will have been vacated pursuant to the mandate.

- If the Commission issues an order based on section 201, 251(g), or 251(i), or a combination thereof, the court will review and then vacate that order for the same reasons that it set forth in *Bell Atlantic* and WorldCom.

- The Commission's best path is to walk away from the *ISP Remand Order*, and move on with comprehensive reform unencumbered by that unfortunate legacy. The Commission could issue a brief order simply stating that ISP-bound traffic is section 251(b)(5), always has been, and that the interim rules have no foundation in the law. Without the need to justify the arbitrary $0.0007 rate, the Commission can address intercarrier compensation reform in a serious way, including an honest and objective examination of the proper costing methodology for reciprocal compensation.

TAB C

EXCERPTS FROM COURT PROCEEDINGS
RELATING TO TELECOMMUNICATIONS TO ISPs

BELL ATLANTIC DECISION

The issue at the heart of this case is whether a call to an ISP is local or long-distance. Neither category fits clearly. The Commission has described local calls, on the one hand, as those in which LECs collaborate to complete a call and are compensated for their respective roles in completing the call, and long-distance calls, on the other, as those in which the LECs collaborate with a long-distance carrier, which itself charges the end-user and pays out compensation to the LECs. See Local Competition Order, 11 FCC Rcd at 16013 (¶ 1034) (1996).

Calls to ISPs are not quite local, because there is some communication taking place between the ISP and out-of-state websites. But they are not quite long-distance, because the subsequent communication is not really a continuation, in the conventional sense, of the initial call to the ISP. The Commission's ruling rests squarely on its decision to employ an end-to-end analysis for purposes of determining whether ISP-traffic is local. There is no dispute that the Commission has historically been justified in relying on this method when determining whether a particular communication is jurisdictionally interstate. But it has yet to provide an explanation why this inquiry is relevant to discerning whether a call to an ISP should fit within the local call model of two collaborating LECs or the long-distance model of a long-distance carrier collaborating with two LECs.

Bell Atlantic Tel. Cos. v. FCC, 206 F. 3d 1, at 5 (2002)(vacating and remanding the *ISP Declaratory Ruling,* 14 FCC Rcd. 3689 (1999)).

But, observes MCI WorldCom, the Commission failed to apply, or even to mention, its definition of "termination," namely "the switching of traffic that is subject to section 251(b)(5) at the terminating carrier's end office switch (or equivalent facility) and delivery of that traffic from that switch to the called party's premises." Local Competition Order, 11 FCC Rcd at 16015 (¶ 1040); 47 CFR § 51.701(d). Calls to ISPs appear to fit this definition: the traffic is switched by the LEC whose customer is the ISP and then delivered to the ISP, which is clearly the "called party."

In its ruling the Commission avoided this result by analyzing the communication on an end-to-end basis: "[T]he communications at issue here do not terminate at the ISP's local server ..., but continue to the ultimate destination or destinations." FCC Ruling, 14 FCC Rcd at 3697 (¶ 12). But the cases it relied on for using this analysis are not on point. Both involved a single continuous communication, originated by an end-user, switched by a long-distance communications carrier, and eventually delivered to its destination. One, Teleconnect Co. v. Bell Telephone Co., 10 FCC Rcd 1626 (1995), aff'd sub nom. Southwestern Bell Tel. Co. v. FCC, 116 F.3d 593 (D.C.Cir.1997) ("Teleconnect"), involved an 800 call to a long-distance carrier, which then routed the call to its intended recipient. The other, In the Matter of Petition for Emergency Relief and Declaratory

Ruling Filed by the BellSouth Corporation, 7 FCC Rcd 1619 (1992), considered a voice mail service. Part of the service, the forwarding of the call from the intended recipient's location to the voice mail apparatus and service, occurred entirely within the subscriber's state, and thus looked local. Looking "end-to-end," however, the Commission refused to focus on this portion of the call but rather considered the service in its entirety (i.e., originating with the out-of-state caller leaving a message, or the subscriber calling from out-of-state to retrieve messages). Id. at 1621 (¶ 12).

Bell Atlantic Tel. Cos. v. FCC, 206 F. 3d. 1, at 6.

The Commission has not satisfactorily explained why an ISP is not, for purposes of reciprocal compensation, "simply a communications-intensive business end user selling a product to other consumer and business end-users."

Bell Atlantic Tel. Cos. v. FCC, 206 F. 3d. 1, at 7.

The Commission nevertheless argues that although the call from the ISP to an out-of-state website is information service for the end-user, it is telecommunications for the ISP, and thus the telecommunications cannot be said to "terminate" at the ISP. As the Commission states: "Even if, from the perspective of the end user as customer, the telecommunications portion of an Internet call 'terminates' at the ISP's server (and information service begins), the remaining portion of the call would continue to constitute telecommunications from the perspective of the ISP as customer." Commission's Br. at 41. Once again, however, the mere fact that the ISP originates further telecommunications does not imply that the original telecommunication does not "terminate" at the ISP. However sound the end-to-end analysis may be for jurisdictional purposes, the Commission has not explained why viewing these linked telecommunications as continuous works for purposes of reciprocal compensation.

Bell Atlantic Tel. Cos. v. FCC, 206 F. 3d. 1, at 7.

This classification of ESPs is something of an embarrassment to the Commission's present ruling. As MCI WorldCom notes, the Commission acknowledged in the *Access Charge Reform Order* that "given the evolution in [information service provider] technologies and markets since we first established access charges in the early 1980s, it is not clear that [information service providers] use the public switched network in a manner analogous to IXCs [inter-exchange carriers]." 12 FCC Rcd at 16133 (¶ 345). It also referred to calls to information service providers as "local." *Id.* at 16132 (¶ 342 n.502). And when this aspect of the *Access Charge Reform Order* was challenged in the 8th Circuit, the Commission's briefwriters responded with a sharp differentiation between such calls and ordinary long-distance calls covered by the "end-to-end" analysis, and even used the analogy employed by MCI WorldCom here-that a call to an information service provider is really like a call to a local business that then uses the telephone to order wares to meet the need. Brief of FCC at 76, *Southwestern Bell v. FCC,* 153 F.3d 523 (8th Cir.1998) (No. 97-2618). When accused of inconsistency in the present matter, the Commission flipped the argument on its head, arguing that its exemption of ESPs

from access charges actually confirms "its understanding that ESPs in fact use interstate access service; otherwise, the exemption would not be necessary." FCC Ruling, 14 FCC Rcd at 3700 (¶ 16). This is not very compelling. Although, to be sure, the Commission used policy arguments to justify the "exemption," it also rested it on an acknowledgment of the real differences between long-distance calls and calls to information service providers. It is obscure why those have now dropped out of the picture.

Because the Commission has not supplied a real explanation for its decision to treat end-to-end analysis as controlling, Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983); 5 U.S.C. § 706(2)(A), we must vacate the ruling and remand the case.

Bell Atlantic Tel. Cos. v. FCC, 206 F. 3d. 1, at 8.

There is an independent ground requiring remand-the fit of the present rule within the governing statute. MCI WorldCom says that ISP-traffic is "telephone exchange service[ ]" as defined in 47 U.S.C. § 153(16), which it claims "is synonymous under the Act with the service used to make local phone calls," and emphatically not "exchange access" as defined in 47 U.S.C. § 153(47). Petitioner MCI WorldCom's Initial Br. at 22. In the only paragraph of the ruling in which the Commission addressed this issue, it merely stated that it "consistently has characterized ESPs as 'users of access service' but has treated them as end users for pricing purposes." FCC Ruling, 14 FCC Rcd at 3701 (¶ 17). In a statutory world of "telephone exchange service" and "exchange access," which the Commission here says constitute the only possibilities, the reference to "access service," combining the different key words from the two terms before us, sheds no light. "Access service" is in fact a pre-Act term, defined as "services and facilities provided for the origination or termination of any interstate or foreign telecommunication." 47 CFR § 69.2(b).

If the Commission meant to place ISP-traffic within a third category, not "telephone exchange service" and not "exchange access," that would conflict with its concession on appeal that "exchange access" and "telephone exchange service" occupy the field. But if it meant that just as ESPs were "users of access service" but treated as end users for pricing purposes, so too ISPs are users of exchange access, the Commission has not provided a satisfactory explanation why this is the case. In fact, in In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended,11 FCC Rcd 21905, 22023 (¶ 248) (1996), the Commission clearly stated that "ISPs do not use exchange access." After oral argument in this case the Commission overruled*9 **336 this determination, saying that "non-carriers may be purchasers of those services." In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, FCC 99-413, at 21 (¶ 43) (Dec. 23, 1999). The Commission relied on its preAct orders in which it had determined that non-carriers can use "access services," and concluded that there is no evidence that Congress, in codifying "exchange access," intended to depart from this understanding. See id. at 21-22 (¶ 44). The Commission, however, did not make this argument in the ruling under review.

Bell Atlantic Tel. Cos. v. FCC, 206 F. 3d. 1, at 8.

Because the Commission has not provided a satisfactory explanation why LECs that terminate calls to ISPs are not properly seen as "terminat[ing] ... local telecommunications traffic," and why such traffic is "exchange access" rather than "telephone exchange service," we vacate the ruling and remand the case to the Commission. We do not reach the objections of the incumbent LECs-that § 251(b)(5) preempts state commission authority to compel payments to the competitor LECs; at present we have no adequately explained classification of these communications, and in the interim our vacatur of the Commission's ruling leaves the incumbents free to seek relief from state-authorized compensation that they believe to be wrongfully imposed.

Bell Atlantic Tel. Cos. v. FCC, 206 F. 3d. 1, at 8.

WORLDCOM HEARING

THE COURT: Let's go back a little further, though. You keep talking about 251(b)(5). But it's completely consistent that 251(g) can't be applied the way the Commission purported to apply it. And at the same time, that these transactions are not governed by 251(b)(5). Isn't that true?

MR. BRADFORD: Your Honor, I'm not sure if I follow the question.

THE COURT: In other words, there are other escape hatches from 251(b)(5), other than 251(g). For example, I mean, simply the fact that in a regular interexchange carrier phone call 251(b)(5) doesn't apply, although you might think by reading its words that it does. But everyone agrees that it doesn't apply to that.

Tr. from hearing in *WorldCom v. FCC,* U.S. Ct. App. (D.C. Cir.) Case No. 01-1218 (Feb. 12, 2002), at 9-10.

THE COURT: Well, is there a distinction in cost between the traffic rates in here and the traffic in a LEC to LEC to interexchange carrier transaction?

MR. RAMSAY: Is there a distinction in

THE COURT: In cost. I'm not quite sure why you focused on cost, but if you want to talk that way, let's talk that way. Is there a distinction between those two?

MR. RAMSAY: The

THE COURT: And what is it?

MR. RAMSAY: Well, the FCC is suggesting, I believe, in their intercarrier compensation document that there's not a difference. And I'm not sure that there is, but the point that I am going to is not, you know, let's go I am conceding to the fact that there might be indeed be a difference there is not a difference. In fact, it would be my view that there would not be a difference in these two types of cost. And the Commission

THE COURT: The two types that I mentioned?

MR. RAMSAY: Excuse me, sir.

THE COURT: The two types that I mentioned? In other words, as I understand it and Mr. Bradford can correct me on rebuttal it's agreed that paragraph 1034 covers not only the sort of standard interexchange carrier call but also the LEC to LEC to interexchange carrier to LEC call.

MR. RAMSAY: Yes, sir.

THE COURT: If that is so, it wouldn't seem to me startling that it would cover the transactions we're concerned with here. At least you haven't identified any reason why it doesn't.

MR. RAMSAY: I'm afraid I don't understand your question, and maybe it's because the direction that I'm going in is if the FCC can find no distinction --

THE COURT: No. I mean, I -- so far as I can make out, you're right in certain respects, that these transactions are the same as ordinary local transactions. But they might also be the same as something covered by paragraph 1034 of the local competition order. Drawing lines here seems to be really difficult.

Tr. from hearing in *WorldCom v. FCC,* U.S. Ct. App. (D.C. Cir.) Case No. 01-1218 (Feb. 12, 2002), at 24-26.

MR. ROGOVIN: Yes. Your Honor, I think the key is that the superseding language of 251(g) and 251(i), which confirms that on a going forward basis the Commission retains its 201 authority, and the entirely expansive scope of 251(g), which is a very

THE COURT: 251(g) does not look to me to be very expansive at all. What you're reading the word "policy" down there comes in a subordinate clause. The thrust of the statute looks like or section looks like a grandfathering provision, on or after the given date, to the extent it provides it shall provide the different services that are listed that apply to such candidate immediately preceding February of 1966 under the court orders and policies, etcetera, until such time as superseded.

And that doesn't look like not only not an extensive grant of power, it doesn't look like any grant of power to me. It looks as if it's principally a grandfathering procedure or provision, and that the contemplation is that the Hashawn regime is going to maintain sway until such time as the Commission acts under some other grant of power.

Tr. from hearing in *WorldCom v. FCC,* U.S. Ct. App. (D.C. Cir.) Case No. 01-1218 (Feb. 12, 2002), at 35-36.

MR. ROGOVIN: Well, Your Honor, the plan is, indeed is a valid exercise of Section 201, which is what the

THE COURT: But if it's a valid exercise of 201, let's say enough to overcome other provisions of the statute, why isn't that enough?

THE COURT: Then you don't need 251(g).

THE COURT: You don't need 251(g).

MR. ROGOVIN: Your Honor, I don't think that we're saying that 251(i) is a sufficient grant of authority to allow us to go forward and resolve this case in the face of 251(b)(5). I think what we're saying is that the interplay between 251(b)(5) and 251(g) first of all, it is ambiguous on its face. I don't think it's absolutely clear

THE COURT: Again, I mean, I think 251(b)(5) is bristling with ambiguity. But I'm not sure that 251(g) helps you in your quest.

MR. ROGOVIN: Well

THE COURT: Did you mean to say that 251(b)(5) is ambiguous on its face?

MR. ROGOVIN: Your Honor, I meant to say that I think reconciling the two of them together and applying them here to the situation where you have the joint provision of access to an information

THE COURT: Well, I ask the question because at one point in your brief and I think it's on page 28 you seem to be arguing that you seem to be relying on Bell Atlantic for the proposition that 251(b)(5) the word "telecommunications" is, in and of itself, ambiguous, without any need to refer to 251(g). Were you intending to make that argument?

MR. ROGOVIN: I think what we were intending to argue is that the word "telecommunications" in 251(b)(5) appears to apply to all telecommunications, and it may well be that this very traffic is covered by 251(b)(5), which requires us to look to 251(g) if we're to

THE COURT: Well, another thing would just be to resolve the ambiguity of 251(b)(5).

MR. ROGOVIN: Well, that certainly was not decided and was not the focus of the Commission's decision.

Tr. from hearing in *WorldCom v. FCC,* U.S. Ct. App. (D.C. Cir.) Case No. 01-1218 (Feb. 12, 2002), at 38-40.

WORLDCOM DECISION

On its face, § 251(g) appears to provide simply for the "continued enforcement" of certain pre-Act regulatory "interconnection restrictions and obligations," including the ones contained in the consent decree that broke up the Bell System, until they are explicitly superceded by Commission action implementing the Act. As the Conference Report explained, "[b]ecause the [Act] completely eliminates the prospective effect of the AT&T Consent Decree, some provision is necessary to keep these requirements in place.... Accordingly, the conference agreement includes a new section 251(g)." H.R. Rep. 104-458, at 122-23 (1996), U.S.Code Cong. & Admin.News 1996, 10, 134.
WorldCom v. FCC, 288 F.3d 429, 432 (2002).

We will assume without deciding that under § 251(g) the Commission might modify LECs' pre-Act "restrictions" or "obligations," pending full implementation of relevant sections of the Act. The Fifth Circuit appeared to make that assumption in Texas Office of Public Utility Counsel v. FCC, 265 F.3d 313 (5th Cir.2001), where it implicitly relied on § 251(g) (by quoting language from an Eighth Circuit case, Competitive Telecom. Ass'n v. FCC, 117 F.3d 1068, 1072 (8th Cir.1997)), in sustaining modifications of pre-Act regulations governing the access charges paid to LECs by inter-exchange carriers ("IXCs"). Id. at 324-25. But this assumption is not enough to justify the Commission's action here, as it seems uncontested-and the Commission declared in the Initial Order-that there had been no pre-Act obligation relating to intercarrier compensation for ISP-bound traffic. See Initial Order, 14 FCC Rcd at 3695, ¶ 9; see also id. at 3690, ¶ 1, 3707-3710, ¶ ¶ 28-36. The best the Commission can do on this score is to point to pre-existing LEC obligations to provide interstate access for ISPs. See, e.g., Remand Order, 16 FCC Rcd at 9164, ¶ 27; In the Matter of MTS & WATS Market Structure, 97 F.C.C.2d 682, 711-15, ¶ ¶ 77-83 (1983). Indeed, the Commission does not even point to any pre-Act, federally created obligation for LECs to interconnect to each other for ISP-bound calls. And even if this hurdle were overcome, there would remain the fact that § 251(g) speaks only of services provided "to interexchange carriers and information *434 **181 service providers"; LECs' services to other LECs, even if en route to an ISP, are not "to" either an IXC or to an ISP.
WorldCom v. FCC, 288 F.3d 429, at 433-34.

Having found that § 251(g) does not provide a basis for the Commission's action, we make no further determinations. For example, as in Bell Atlantic, we do not decide whether handling calls to ISPs constitutes "telephone exchange service" or "exchange access" (as those terms are defined in the Act, 47 U.S.C. § § 153(16), 153(47)) or neither, or whether those terms cover the universe to which such calls might belong. Nor do we decide the scope of the "telecommunications" covered by § 251(b)(5). Nor do we decide whether the Commission may adopt bill-and-keep for ISP-bound calls pursuant to § 251(b)(5); see § 252(d)(B)(i) (referring to bill-and-keep). Indeed these are only samples of the issues we do not decide, which are in fact all issues other than whether § 251(g) provided the authority claimed by the Commission for not applying § 251(b)(5).
WorldCom v. FCC, 288 F.3d 429, at 434.

Moreover, we do not decide petitioners' claims that the interim pricing limits imposed by the Commission are inadequately reasoned. Because we can't yet know the legal basis for the Commission's ultimate rules, or even what those rules may prove to be, we have no meaningful context in which to assess these explicitly transitional measures. *WorldCom v. FCC,* 288 F.3d 429, at 434.

Finally, we do not vacate the order. Many of the petitioners themselves favor bill-and-keep, and there is plainly a non-trivial likelihood that the Commission has authority to elect such a system (perhaps under § § 251(b)(5) and 252(d)(B)(i)). *WorldCom v. FCC,* 288 F.3d 429, at 434.

JUDGE EDWARDS: Now, what is the agency's most recent position on 251(b)(5)? Is ISP-bound traffic excluded or included in light of what we've been telling you?

MS. BOEHLEY: In this Court's WorldCom decision, the Court left --

JUDGE EDWARDS: No, start with my question first, then we can chat about what you think we've been saying. Does the agency have a position now?

MS. BOEHLEY: It remains the FCC's position, correct, that

JUDGE EDWARDS: Yeah, does the FCC agree that --

MS. BOEHLEY: -- this traffic is -

JUDGE EDWARDS: -- ISP-bound traffic is -

MS. BOEHLEY: --- is not subject to 251(b)(5).

JUDGE EDWARDS: They're saying it's not subject?

MS. BOEHLEY: Correct. That Internet-bound traffic is not subject.

JUDGE EDWARDS: Where are they saying that most, I mean, every time that's come up, you've lost. Now, have they said something more recently? I'm just curious.

MS. BOEHLEY: No, Your Honor, what, the basis for the FCC's position is that in the WorldCom case, the Court did not stay or reverse the FCC on the issue of the inter-carrier compensation mechanism that it put in place as a transitional mechanism. And that is based on the assumption that compensation is not required under 251(b)(5). In fact, however, though, that's not this case. The agency is -

JUDGE EDWARDS: It may or may not be required. I know it's not this case, so we don't need to do that.

MS. BOEHLEY: Sure.

JUDGE EDWARDS: The question is does 251 cover it?

MS. BOEHLEY: The short answer to your question --

JUDGE EDWARDS: 251(b)(5) cover it. The FCC started out at the box saying it's excluded. Now, you've had no reception to that. Are they still sticking with that, that this is excluded?

MS. BOEHLEY: The FCC has said --

JUDGE EDWARDS: And let me tell you why, because the indeterminacy piece of it I can understand. There are real problems the other side has. But I must say, the other side here is the FCC's playing games, from my vantage point, which don't make any sense to me. You got to fish or cut bait. Where are we going with this? What is this about? How do we analyze this case? I mean, it drives me crazy to try and prepare a case like this where the agency's saying we're not going to tell you anything about anything. You either have it or you don't have it. Should they be trying to file? If it's excluded, indeed, the state went with the FCC initially. They didn't even try and analyze it. The state first said, well, that's what the FCC said, it's not covered, so we're not going to deal with it. Then the FCC says, well, no, that's not quite it.

And one rationale you have here which makes no sense to me is that Global NAPs agreed that it would receive compensation under its interconnection agreement or not. I don't find anything in the record there. I find a lot of discussion about it and I know that's your second rationale. You have a powerful case on indeterminacy, I think, in my own view, so you understand where I'm coming from. You have no case on that finding, because there's nothing to support that agreement. Nothing. As far as I could find.

And I can't figure out what the agency's doing. Where are we on 251(b)(5)? Are you saying this is, the agency, that it's excluded or not? Because I really don't like for us to be issuing opinions when we don't know what we're talking about.

JUDGE WILLIAMS: Can I just add an amendment? I mean, it's following the same line. Is there in fact an FCC ruling following WorldCom on the WorldCom issues?

JUDGE EDWARDS: That's what I was meaning to ask.

JUDGE WILLIAMS: Or not?

MS. BOEHLEY: No, Your Honors. The FCC is --

JUDGE WILLIAMS: There's no new ruling?

MS. BOEHLEY: -- is working diligently to issue an order. It has not yet done so to date.

JUDGE WILLIAMS: I think that answers Judge Edwards's question..

JUDGE EDWARDS: Working diligently to issue an order pursuant to 251(b)(5)? You see, if the bill-and-keep system is adopted, as I understood the. prior cases, that would be issued pursuant to 251(b)(5), is that right?

MS. BOEHLEY: That's correct.

JUDGE EDWARDS: Well, then, that suggests that ISP-bound traffic is covered by 251(b)(5).

Tr. from hearing in *Global Naps v. FCC,* U.S. Ct. App. (D.C. Cir.) Case No. 02-1202 (Oct. 20, 2003), at 19-23.

JUDGE TATEL: Why does it take seven years to answer this very simple question, which is what is the legal basis for treating ISP calls differently? I mean, it's not like most of our mandamus cases where the charge to the agency is extremely complex. This is just a straightforward question. What's the legal authority for treating ISP differently?

MR. PALMORE: Well, this question is a small and diminishing question that's part of a larger cluster of questions which involves how should intercarrier -- how should telecommunications carriers be compensated in more than one collaborated (indiscernible) call.

JUDGE TATEL: Wouldn't it help the Commission to have an answer to this question as it considers the more comprehensive question?

MR. PALMORE: No, I don't think it would, because what the Commission has said is that if it -- the problem with the current regime is that the Commission has a piecemeal, a patchwork of different regulatory regimes --

JUDGE TATEL: But my question -- if there is no legal basis for treating ISP calls differently, then that takes one of the options the Commission is considering off the table.

MR. PALMORE: There -- this question of compensation

for traffic to dial-up Internet service providers is just one of many related issues that the Commission intends to address in a comprehensive way that --

JUDGE TATEL: But this issue will be addressed in the comprehensive order, right?

MR. PALMORE: Absolutely.

JUDGE TATEL: So wouldn't the Commission like to know whether there's a legal basis for treating it separately now? Wouldn't that help the Commission?

MR. PALMORE: No, Your Honor, because there could be spillover effect. Any way that the Commission decides this

12 question, there could be spillover effect for other kinds of
13 traffic. For other aspects of this current patchwork --

14 JUDGE TATEL: Wouldn't it be helpful to know that
15 now? That's my only question.

16 MR. PALMORE: It would helpful for -- what the
17 Commission wants to do is develop a comprehensive set of rules
18 that deals with all of this traffic at the same time.

Tr. at 14-15

JUDGE TATEL: So the issue is unresolved. There is
4 still traffic covered by it. Yes, it may be less because of
5 broadband, but why does that make a difference in terms of the
6 issue before this court today?

7 MR. PALMORE: Because that goes to the Commission's
8 policy judgment and its docket management discretion. So the
9 -- if I were to conclude that unreasonable delay is not a
10 mechanical exercise in time management, the Commission -- the
11 court looks at all of the relevant circumstances. And here,
12 what the court has to consider is the fact that the Commission
13 has indicated that it does intend to address this remand as
14 part of its larger proceeding.

15 JUDGE GARLAND: I don't understand. These people
16 are not being paid during all these nine years.

17 MR. PALMORE: They are --

18 JUDGE GARLAND: Except under the interim rules,
19 right?

20 MR. PALMORE: Correct.

21 JUDGE GARLAND: And we've said that there's no
22 statutory basis so far that you put forward. All we're asking
23 you to tell us is what the statutory basis is. You've tried
24 twice, failed both times. Now, this means that during this
25 entire nine years, it may turn out that there was no basis
DLB 17
1 during that entire nine years. You may want a comprehensive
2 scheme, but you have some plaintiffs here who are being
3 injured for nine years. Now, I really don't understand why
4 you just can't give the reason. No one is telling you to put

5 into effect a particular rule or not a rule. The only thing
6 that was requested in the last remand was to state the basis
7 for the rule.

Tr. at 16-17.

MANDAMUS DECISION

The Federal Communications Commission (FCC) has twice failed to articulate a valid legal justification for its rules governing intercarrier compensation for telecommunications traffic bound for Internet service providers (ISPs). In March 2000, this court vacated and remanded the Commission's first attempt at a justification. In May 2002, we rejected its second attempt, in that case remanding without vacating because we thought there was a "non-trivial likelihood" the Commission would be able to state a valid legal basis for its rule.

No such justification has been forthcoming.
In re Core Communications, 531 F.3d 849, 850 (2008).

At this point, the FCC's delay in responding to our remand is egregious.

We therefore grant the writ of mandamus sought by Core and direct the FCC to explain the legal basis for its ISP-bound compensation rules within six months of the date of the oral argument in this case. There will be no extensions of that deadline. The rules will be vacated on the day after the deadline, unless the court is notified that the Commission has complied with our direction.
In re Core Communications, 531 F.3d 849, at 850.

If ISP-bound traffic were governed by § 251(b)(5), reciprocal compensation arrangements would be required for the ILEC-to-CLEC hand-off just described, and ILECs would be required to compensate CLECs-like Core-for completing their customers' calls to ISPs.
In re Core Communications, 531 F.3d 849, at 851.

In granting the writ of mandamus, we do not second-guess the FCC's policy judgment to pursue a comprehensive solution to the problem of intercarrier compensation. See Action on Smoking & Health v. Department of Labor, 100 F.3d 991, 994 (D.C.Cir.1996). But as we said in MCI, in response to a similar plea by the FCC to allow it to continue in effect rates that had been found unsupported pending the issuance of "comprehensive procedures": "[T]here must be some limit to the time tariffs unjustified under the law can remain in effect.... Otherwise, the regulatory scheme Congress has crafted becomes anarchic...." 627 F.2d at 325. We are also, as always, "acutely aware of the limits of our institutional competence in [a] highly technical area," Grand Canyon Air Tour Coal. v. FAA, 154 F.3d 455, 476 (D.C.Cir.1998), and loath to "interfere with the agency's internal processes," United Mine Workers, 190 F.3d at 553. But what Core asks us to do is neither technical nor intrusive. Core does not ask the FCC to promulgate any particular rule or policy; it asks only that the Commission state the legal authority for the current rule that refuses Core the right to reciprocal compensation. Either the FCC has such authority or it does not. If the FCC believes it has authority, it should not take six years to put its rationale in writing. Even if the Commission ultimately decides to include ISP-bound traffic in a more comprehensive scheme, it still must have statutory authority to do so. See, e.g., FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 161, 120

S.Ct. 1291, 146 L.Ed.2d 121 (2000) ("[A]n administrative agency's power to regulate ... must always be grounded in a valid grant of authority from Congress."). Stating that rationale now should not impede the FCC's broader rulemaking project.
In re Core Communications, 531 F.3d 849, at 859.

As we noted above, in an effort to stave off Core's request, FCC counsel represented that the Commission's Chairman intends to achieve comprehensive intercarrier compensation reform within six months. Such reform, counsel advised, would include a response to our WorldCom remand. We will give the Chairman a chance to meet that schedule, and will direct the Commission to issue its explanation by November 5, 2008-six months from the day that representation was made.
In re Core Communications, 531 F.3d 849, at 861.

We agree with Core, however, that this must be the end of the Commission's delay. The first time we determined that the rationale for the rules was invalid, in Bell Atlantic, we vacated as well as remanded. 206 F.3d at 9. In less than a year, the FCC issued a new order with a new rationale. When we concluded in WorldCom that the FCC's second rationale was also invalid, we plainly had authority to vacate again. See5 U.S.C. § 706 (stating that a reviewing court shall "set aside" agency action found to be "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right"); see also Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n, 988 F.2d 146, 150-51 (D.C.Cir.1993). Instead, we chose only to remand, believing that there was a "non-trivial likelihood" that the Commission would be able to state a valid legal basis for its rules. WorldCom, 288 F.3d at 434; see Allied-Signal, 988 F.2d at 151 (noting that, when there is a "serious possibility that the Commission will be able to substantiate its decision on remand," we may remand without vacating). This time, there was no prompt response-only six years of promises and further delay.
In re Core Communications, 531 F.3d 849, at 861.

Having repeatedly, and mistakenly, put our faith in the Commission, we will not do so again. If the FCC cannot, within six months, explain its legal authority for the interim rules, we can only presume that this is because there is in fact no such authority. Under those conditions, vacatur is indicated. See Allied-Signal, 988 F.2d at 150-51. Accordingly, the rules will be vacated on November 6, 2008, unless the court is notified that the Commission has complied with our direction before that date.
In re Core Communications, 531 F.3d 849, at 861.

For the foregoing reasons, we grant the writ of mandamus and direct the FCC to *862 respond to our 2002 WorldCom remand by November 5, 2008. That response must be in the form of a final, appealable order that explains the legal authority for the Commission's interim intercarrier compensation rules that exclude ISP-bound traffic from the reciprocal compensation requirement of § 251(b)(5). No extensions of this deadline will be granted. The rules are hereby vacated on November 6, 2008, unless the court is notified that the Commission has complied with our direction before that date. This panel

of the court will retain jurisdiction over the case to ensure compliance with our decision. See MCI, 627 F.2d at 325.
In re Core Communications, 531 F.3d 849, at 861-62.

TAB D

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	)	
	)	
Intercarrier Compensation for ISP-Bound Traffic	)	CC Docket No. 99-68
	)	
	)	
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	

SUPPLEMENTAL *EX PARTE* OF
CORE COMMUNICATIONS, INC.

Core Communications, Inc. ("Core"), by its undersigned counsel, hereby submits this supplemental *ex parte* filing to summarize important aspects of the record in this proceeding.

I. INTRODUCTION AND SUMMARY

Core continues to support the Federal Communications Commission's ("Commission" or "FCC") goal of intercarrier compensation unification. If press reports and filings of other parties are any indication, the Commission appears to be on the cusp of achieving this goal by applying § 251(b)(5) of the Communications Act of 1934, as amended ("Act"), to the transport and termination of all telecommunications, subject to rates set by the state commissions pursuant to § 252(d)(2) using the Commission's TELRIC methodology. Were the Commission to follow this natural construction of the statute, the Commission would satisfy its stated unifications goals with an order that most certainly would withstand judicial review. By contrast, to the extent the Commission attempts to create temporary or permanent exceptions from a 251(b)(5)/252(d)(2) construction of the Act, the Commission would needlessly risk an adverse decision upon judicial review, which would be unfortunate for the industry and the Commission.

In the sections that follow, Core largely limits its discussion to the pending mandamus proceeding, *In re Core Communications, Inc.* 531 F.3d 849 (D.C. Cir. 2008). First, Core demonstrates that § 201 provides no basis for excluding ISP-bound traffic from § 251(b)(5). Second, Core demonstrates that the Commission may not retroactively forbear from § 251(b)(5) to satisfy the mandamus, and moreover, forbearance (even prospectively) would not result in the relief claimed. Third, Core explains that denominating telecommunications to ISPs as an "information service" would not exclude such telecommunications from § 251(b)(5). Fourth, Core shows that the FCC cannot exempt telecommunications to ISPs from § 251(b)(5) on an interim basis. This is particularly true if § 251(b)(5) is the basis upon which the Commission unifies intercarrier compensation systems. Fifth, Core briefly addresses unsupported assertions raised regarding retroactive vacatur of the *ISP Remand Order*.[1]

At bottom, the Commission should acknowledge the error of the *ISP Remand Order* and find that no party has put forth a satisfactory legal basis for excluding telecommunications to ISPs from § 251(b)(5). In responding to the mandamus, the Commission must recognize that its decision will bind the Commission in its broader reform efforts today and in the future. Above all, the Commission should follow the law and set forth a statutorily-grounded intercarrier compensation system.

II. RESPONSE TO THE *IN RE CORE* MANDAMUS

In *In re Core*, the Court directed the FCC to:

> [R]espond to our 2002 *WorldCom* remand by November 5, 2008. That response must be in the form of a final, appealable order that explains the legal authority for the Commission's interim intercarrier compensation

[1] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 96-98, CC Docket No. 99-68, Order on Remand and Report and Order, 16 FCC Rcd. 9151 (2001) (subsequent history omitted) ("*ISP Remand Order*").

> rules that exclude ISP-bound traffic from the reciprocal compensation requirement of § 251(b)(5). No extensions of this deadline will be granted. The rules are hereby vacated on November 6, 2008, unless the court is notified that the Commission has complied with our direction before that date.

531 F.3d at 862. "If the FCC cannot, within six months, explain its legal authority for the interim rules, [the Court] can only presume that this is because there is in fact no such authority. Under those conditions, vacatur is indicated." *Id.* at 861. Thus, *In re Core* provides the Commission with the option of either offering a legal basis for excluding telecommunications to ISPs from § 251(b)(5) or finding that no such legal basis exists. In the case of the latter, the Commission could either (i) permit the *ISP Remand Order* to be vacated *sub silentio* or (ii) the Commission could issue an order finding that the various theories set forth by proponents of the on-going application of the *ISP Remand Order* do not comport with the Act. Indeed, the existing record in this proceeding has demonstrated that there is no valid basis for excluding telecommunications to ISPs from § 251(b)(5).

A. Section 201

At least one party has suggested that the Commission could rely on § 201 of the Act to exempt telecommunications to ISPs from § 251(b)(5). Section 201 provides no such basis. And, when the Commission in 1999 relied on § 201 in its first effort to segregate telecommunications to ISPs for discriminatory treatment, the D.C. Circuit vacated that decision. *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1, 7-8 (D.C. Cir. 2000). To be sure, the "FCC has rulemaking authority" under § 201 "to carry out the 'provisions of this Act,' which include §§ 251 and 252, added by the Telecommunications Act of 1996." *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (footnote omitted). That rulemaking authority to *implement* statutory provisions provides no basis for *excluding* telecommunications traffic to ISPs from § 251(b)(5). As the

FCC itself has concluded, § 251(b)(5) applies on its face to all telecommunications, including telecommunications to ISPs. *See, e.g., ISP Remand Order* at 9166-67 and 9170-71.

The FCC's § 201 rulemaking authority further does not empower the Commission to prescribe rates for items set forth in § 251; rather, that ratemaking authority is the responsibility of the state commissions. "[T]he FCC does not have jurisdiction to set the actual prices the state commissions use." *Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 757 (8th Cir. 2000). The $0.0007 rate cap the FCC prescribed in the *ISP Remand Order* is a rate, not a methodology for determining a rate.[2] That the FCC has delegated (impermissibly)[3] authority to incumbent local exchange carriers ("ILECs") to make a choice as to whether $0.0007 or the state commission-set TELRIC rate applies makes no difference. That ILEC decision goes to application of the rate, not the methodology for calculating the rate.

B. Forbearance

Suggestions that the Commission could "forbear" from § 251(b)(5) retroactively also fail. First, the FCC has never forborne from § 251(b)(5), and forbearance only provides prospective relief. In *In re Core*, the Commission argued that mandamus was inappropriate because Core could get relief through a forbearance petition. 531 F.3d at 860 ("If Core were to prevail in its forbearance appeal, [FCC] counsel argues, the Commission could no longer apply the interim compensation rules and Core's problem would be solved."). The Court rejected this view, noting that "forbearance offers only prospective relief." *Id.*

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2 Any effort to prescribe a rate of $0.00, *i.e.*, "bill and keep," would fail for similar reasons.

3 "[W]hile federal agency officials may subdelegate their decision-making authority to subordinates absent evidence of contrary congressional intent, they may not subdelegate to outside entities – private or sovereign – absent affirmative evidence of authority to do so." *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 556 (D.C. Cir. 2004). Indeed, "subdelegations to outside parties are assumed to be improper absent an affirmative showing of congressional authorization." *Id.* at 565. Here, nothing in the Act or its amendments suggests that the Commission may subdelegate rate application decisions to ILECs.

Second, forbearance from § 251(b)(5) would affect all telecommunications, not simply telecommunications to ISPs, as some suggest. There is no statutorily-defined category of traffic denominated "ISP." The Commission attempted to create one pursuant to the "information access" category set forth in § 251(g), but the D.C. Circuit rejected that classification, as it rejected the Commission's reliance on § 251(g). *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2001). Put another way, the notion that forbearance from § 251(b)(5) could apply only to "ISP traffic" assumes *a priori* that "ISP traffic" is a separate category of traffic. But this is pure question begging. The Court has charged the Commission with explaining "the legal authority [for] ... exclud[ing] ISP-bound traffic from the reciprocal compensation requirement of § 251(b)(5)." *In re Core*, 531 F.3d at 862. And, no statutory basis exists for subdividing "telecommunications" under § 251(b)(5) into discrete classes and then discriminating against one purported subspecies.

Third, forbearance only results in the elimination of regulation, not the establishment of new regulation. *See, e.g., Petition of Core Communications, Inc. for Forbearance from Sections 251(g) and 254(g) of the Communications Act and Implementing Rules*, Memorandum Opinion and Order, 22 FCC Rcd. 14117-18 ¶16 (2007), review pending, *Core Communications v. FCC*, No. 07-1381 (D.C. Cir.) (oral argument held October 7, 2008). Forbearance would result in the absence of regulation, which the Commission has termed a "regulatory void." *Id.* Thus, excluding telecommunications to ISPs from § 251(b)(5) would necessarily require new regulation, and therefore, forbearance would not result in the relief proposed.

Fourth, any Commission effort to forbear from § 251(b)(5) would have to satisfy the § 160(a) and (b) factors for evaluating forbearance. The Commission already has determined

that a "regulatory void" does not satisfy the § 160(a) factors. *Id.* In any event, discriminating against end users that are ISPs is not necessary to ensure that the rates telecommunications carriers charge are just and reasonable. TELRIC rates prescribed by state commissions under § 252(d)(2) are just and reasonable – and cost based. Discriminating against telecommunications to ISPs is not necessary to protect consumers. Discriminating against telecommunications to ISPs is not necessary to further the public interest, nor is such discrimination necessary to promote competition.

C. Title I Information Service

Denominating telecommunications to ISPs as a "Title I" "information service" similarly would not provide a legal basis for excluding such traffic from § 251(b)(5). "Information services" constitute "telecommunications." Indeed, both "telecommunications services" and "information services" constitute "telecommunications." *See, e.g., Vonage Holdings v. FCC*, 489 F.3d 1232, 1239-40 (D.C. Cir. 2006). Section 251(b)(5) applies to "all telecommunications" that are not subject to § 251(g)'s "carve out" for traffic governed by compensation regimes that pre-date the 1996 Act. No pre-1996 Act compensation regime applied to telecommunications to ISPs. Accordingly, telecommunications to ISPs fall within § 251(b)(5), and all § 251(b)(5) traffic is subject to state commission pricing regulation pursuant to § 252(d)(2).

The Commission cannot utilize its Title I authority to excise telecommunications to ISPs from §§ 251(b)(5) and 252(d)(2). The FCC's Title I jurisdiction is narrow and cannot be used to overwrite substantive provisions of the Act. *See American Library Ass'n. v. FCC*, 406 F.3d 689, 692-93 (D.C. Cir. 2005) (holding that the Commission may regulate under its ancillary jurisdiction when "the subject of the regulation [is both] ... covered by the Commission's general

grant of jurisdiction under Title I of the Communications Act ... [and] 'reasonably ancillary to the effective performance of the Commission's various responsibilities'" (citation omitted)). Here, however, no such reach to "ancillary" authority is necessary or permitted. Title II applies to "telecommunications," and the FCC has subjected telecommunications to ISPs to Title II obligations. The Commission cannot "over-ride virtually any provision of the 1996 Act" simply by invoking Title I. *See WorldCom v. FCC*, 288 F.3d 429, 433 (2002) (remand pending).

D. Interim Rates And Transition

Sources have reported that the Commission is possibly considering relying upon some claim of "interim" or "transitional" authority to justify: (1) the interim rules arising out of the *ISP Remand Order*; and (2) a new rule that would continue to cap compensation for ISP-bound traffic (and only such traffic) at a rate of $0.0007 for a "transitional" period of up to ten years. Although courts have recognized the FCC's ability to shape transitional mechanisms to avoid market disruption, the FCC's current proposal (as Core understands it) would stretch the concept of interim authority well beyond the judicial breaking point.

1. Invoking "Interim Authority" Will Not Satisfy The Mandamus

The *In re Core* Court fully understands that the "interim" rules (rate cap, growth cap, new market bar, mirroring rule, ILEC election, etc.) are premised on the FCC's previous assertion of "interim authority" in the *ISP Remand Order*. As the Court noted:

> The *interim regime*, the FCC said, will govern intercarrier compensation for ISP-bound traffic until we have resolved the issues raised in the intercarrier compensation NPRM. According to the FCC, this would be *a three-year interim intercarrier compensation mechanism* for the exchange of ISP-bound traffic.

531 F.3d at 853 (emphasis added). The Court also noted that the Commission, in response to Core's initial 2004 mandamus petition, has already committed to issue final rules to replace the interim regime:

> FCC counsel reported that the Commission had just released a [FNPRM] in the Intercarrier Compensation docket in which it has been seeking ... to adopt *permanent rules to succeed the interim intercarrier compensation regime* for Internet-bound traffic ... Based on the FCC's representations regarding the draft order and the FNPRM, we denied Core's mandamus petition...."

Id. at 854. The FCC may not satisfy the mandate by "doubling down" on its interim authority, or otherwise by merging its ostensible "transition" for ISP-bound traffic into a "transition" for all traffic. The court is expecting a straightforward, statutory basis for the interim rules.

Invoking an "interim" or "transitional" authority talisman is no substitute for providing the Court with a legal basis for excluding telecommunications to ISPs from § 251(b)(5). The Court will not accept any explanation that the interim regime was simply a prescient precursor to a new interim regime. A valid exercise of rate making authority is prerequisite to establishing rates, even on an interim basis. *Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 757 (8th Cir. 2000) (vacating interim rates established by the Commission because it "does not have jurisdiction to set the actual prices the state commissions use"). Moreover, the history of the *WorldCom* remand and the *In re Core* mandamus strongly suggests that the Court will have little patience with any effort by the Commission to invoke "interim authority" detached from a valid source of statutory authority. *See, e.g., In re Core*, 531 F.3d at 861 ("[h]aving repeatedly, and mistakenly, put our faith in the Commission, we will not do so again"). After *In re Core* (if not before), any exercise of "interim authority" by the Commission must be paired with a statutory source of legal authority.

2. "Transition" Cannot Justify Prospective Rules That Continue to Discriminate Against Telecommunications To ISPs

Nor should the FCC attempt to leverage any claimed "transitional" or "interim" authority to justify on-going application of the *ISP Remand Order's* $0.0007 rate cap for ISP-bound traffic in the future. In order to invoke interim or transitional authority, the FCC must clearly articulate: (1) a lawful starting point; (2) a lawful end point; and (3) how the interim measures facilitate a transition from start to end.

In the case of telecommunications to ISPs, there is no lawful starting point, unless one accepts Core's contention that it is fully compensable, reciprocal compensation traffic under section 251(b)(5) of the Act. The "interim" regime is not a valid basis to support a transition, because: (1) it is itself explicitly a transition; (2) it has no known statutory basis; and (3) it has no temporal or substantive end point. The *ISP Remand Order* articulated a three-year transition to global rate unification, which is now in its seventh year. Moreover, in its 2005 Further Notice of Proposed Rulemaking, the Commission abandoned its previously stated move to a termination rate of $0.00 ("bill-and-keep") as its end point.

Further shifting course, it appears that the Commission is contemplating a move to a new "additional cost" standard, which apparently will supersede the well-established, judicially sustained TELRIC methodology. When, if ever, and under what means, such a change in pricing methodology might occur, is anyone's guess. Combining multiple transition periods with a new and different end goal to be implemented at some undisclosed future point does not result in a "legal basis" for excluding telecommunications to ISPs from § 251(b)(5). Moreover, the Commission cannot prescribe an "interim" rate en route to a new methodology unless it has a valid statutory basis for doing so. *Iowa Utils. Bd.* at 757.

This is especially true where, as here, the Commission appears to be considering a 10 year lengthy transition period. Due to the inherent uncertainty associated with predicting variables such as inflation, equipment costs, and the cost of capital, the Commission could not possibly predict that its "additional cost" methodology will automatically yield a termination rate at or below $0.0007. Indeed, if the Commission's "additional cost" methodology resulted in such a rate with certainty, then it would mean that the FCC is impermissibly prescribing a rate, rather than a methodology, in violation of the Act.

Of course, to the extent that the Commission finds that § 251(b)(5) applies to all telecommunications traffic – including traffic to ISPs – at the "end point" of any transition, the Commission would have no basis at all for past or on-going enforcement of its rate cap. Indeed, such a finding would further demonstrate that there is no legal basis, and no valid policy basis, for excluding telecommunications to ISPs from § 251(b)(5). At a minimum, the Commission would have to articulate some alternative legal authority to maintain its discriminatory $0.0007 rate against telecommunications to ISPs. But "[e]ven if the Commission ultimately decides to include ISP-bound traffic in a more comprehensive scheme, it still must have statutory authority to do so." *In re Core*, 531 F.3d at 859. And, "if ISP-bound traffic [is] governed by § 251(b)(5), reciprocal compensation arrangements would be required for the ILEC-to-CLEC hand-off...." *Id.* at 851.

C. Unsupported "Market Disruption" Concerns

Other than *ipse dixit* claims by counsel, the record is bereft of any evidence that vacatur of the *ISP Remand Order* would result in any meaningful harm to any carrier. Indeed,

the only actual evidence in the record demonstrates that the $0.0007 rate cap set forth in the *ISP Remand Order* is below cost. Vacatur of the *ISP Remand Order* would right that wrong.

To the extent parties truly fear either retroactive claims or prospective harm, one would reasonably expect evidentiary submittals. But none have been forthcoming. No party has submitted any contracts into the record demonstrating retroactive liability. Similarly, no party submitted any contracts into the record demonstrating that their termination costs would automatically increase as a result of vacatur of the *ISP Remand Order*. And, none of the public companies have submitted Securities and Exchange Commission filings into the record suggesting either retroactive or prospective liability. Nor have any companies even submitted declarations outlining any such liability.

There simply is no evidence in the record of any demonstrable harm to any carrier that would result from vacatur of the *ISP Remand Order*. To be sure, Core has asserted and plans to pursue a claim against Verizon for compensation lost. But there is no record evidence that any other carrier has made any such claim, and Core has made no other claim. Verizon has never even alleged that liability to Core would meaningfully impact Verizon financially, because it would not. The reason no other carrier has made a claim may very well be because no other claims exist. Foremost, AT&T, Verizon, and Qwest appear to be the only ILECs that "opted-in" to the *ISP Remand Order*. In Core's experience negotiating and arbitrating interconnection agreements with thirty-four (34) rural LECs in Pennsylvania, rural LECs generally have not opted into the *Order*, or else take the position that the *Order* does not apply to them. Claims for retroactive compensation have been wiped out by the myriad bankruptcies, settlement agreements, and negotiated interconnection agreements that established voluntary, below-cost rates, as Level 3 notes. Similarly, agreements between the three electing ILECs and the wireless

carriers appear to have been voluntary. At bottom, however, Core has no burden of demonstrating that virtually no retroactive claims exist. But the absence of any evidentiary support for naked assertions of "market disruption" highlights the weakness of such claims.[4]

III. CONCLUSION

Consistent with the foregoing and Core's other advocacy in this proceeding, the Commission should acknowledge that no party has put forward a sustainable legal basis for excluding telecommunications to ISPs from § 251(b)(5), and thereby permit the vacatur of the *ISP Remand Order*. In the alternative, the Commission has the latitude to offer no response and simply permit the *ISP Remand Order* to be vacated by operation of the *In re Core* decision at the conclusion of November 5, 2008.

[4] For example, Verizon and Verizon Wireless assert, without any evidentiary support, possible liability of over one billion dollars. One would think that a company facing a billion dollars in liability would make an explicit disclosure in its Securities and Exchange Commission filings or otherwise set forth in an affidavit the source of its calculation. Verizon and Verizon Wireless have done neither. Moreover, their lawyers appear to base this billion dollar plus assertion on a reciprocal compensation rate of $0.004 per minute of use. Actual record evidence demonstrates that reciprocal compensation rates are typically half that amount. Moreover, Verizon and Verizon Wireless make no effort to name to which carriers such liability might run, nor do they explain whether they are including in their tally monies paid to one another.

Respectfully submitted,

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